1976

Anita Dumesnil Cummings v. Patrick C. Cummings : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE

STATE OF UTAH

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ANITA DUMESNIL CUMMINGS, Plaintiff-Respondent, vs. PATRICK C. CUMMINGS, Defendant-Appellant.	)	Case No. 14611

BRIEF OF APPELLANT

Appeal from Judgment of the District Court of the
Third Judicial District
In and For Salt Lake County, State of Utah

Honorable Bryant H. Croft,
Judge

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NATURE OF THE CASE

This is an appeal from a Judgment, Order and Modification of Decree granted on the 5th day of May, 1976, by the Honorable Bryant H. Croft on Plaintiff's Order to Show Cause and Defendant's Petition to Modify Divorce Decree. Both parties in person and by counsel, were sworn and each testified and presented documentary evidence in support of his or her position.

This action was originally commenced by the filing, on December 14, 1972, of a Complaint by Plaintiff-Respondent, ANITA DUMESNIL CUMMINGS, against Defenant-Appellant, PATRICK C. CUMMINGS, seeking a Decree of Divorce, control and custody of the three minor children subject to reasonable visitation

privileges in the Defendant-Appellant, the family home and automobile, along with division of assets accumulated by the parties, attorneys' fees, as well as alimony and child support.

Defendant-Appellant answered and counterclaimed for a Decree of Divorce and other relief in an answer and counterclaim filed January 5, 1973; the first of multiple supplementary proceedings was heard on an Order to Show Cause before the Honorable Marcellus K. Snow on the 7th of May, 1973. There Defendant-Appellant was ordered to provide certain temporary support, assume certain liability, and the framework of visitation was there first established by court order. Marriage counseling occurred by the Family Court Division, and it was the recommendation of the Family Court Commissioner that the divorce proceedings be allowed to proceed. Trial was held on the 19th day of December, 1973, before the Honorable G. Hal Taylor. Based on the Findings of Fact and Conclusions of Law made and entered by the trial court, it was decreed that Plaintiff-Respondent would be granted a Decree of Divorce from Defendant-Appellant on the ground of mental cruelty; that custody of the three minor children, subject to reasonable visitation, be granted Plaintiff-Respondent; that Defendant-Appellant be ordered to pay Plaintiff-Respondent the sum of $125.00 per month for the benefit of each minor child and $200.00 per

month alimony; that the family home be Plaintiff-Respondent's sole property; and that Plaintiff-Respondent be granted certain other relief as against Defendant-Appellant.

Plaintiff then moved for a new trial and for amendment of judgment in the motion filed January 23, 1974, said motion heard before the Honorable G. Hal Taylor on the 31st day of January, 1974. Judge Taylor at that hearing granted Plaintiff's motion for new trial on the issues of division of property and alimony. Plaintiff-Respondent and Defendant-Appellant entered into a stipulation as between the parties dividing the property, defining the custody and rights of visitation, agreeing to child support of $375.00 on the facts that then existed, and agreeing to alimony in the sum of $285.00 per month, terminating on Plaintiff's remarriage or death. Pursuant to the stipulation of counsel, the original Decree of Divorce entered on the 15th day of January, 1974, was modified by Amended Decree of Divorce entered the 26th day of June, 1974.

Defendant-Appellant then caused to be issued an Order to Show Cause why Plaintiff-Respondent should not be held in contempt for selling and disposing of items of personal property and refusing to deliver other property awarded to him pursuant to the Amended Decree of Divorce; said Order to Show Cause was heard by the trial court on the 12th day of November, 1974, and the parties were ordered to comply with the Amended Decree of Divorce.

Plaintiff-Respondent then moved for an Order to Show Cause why Defendant-Appellant should not be adjudged guilty of contempt for wilfully disregarding the Amended Decree of Divorce. Defendant-Appellant then responded with a verified petition for modification of decree and Order to Show Cause. The motions of the parties were consolidated and heard before the Honorable Bryant H. Croft on the 5th day of May, 1976. The order arising from that hearing is the subject of this appeal.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the lower court's order and judgment with respect to the issue of alimony.

STATEMENT OF FACTS

The parties were married on the 30th day of June, 1962, in the State of California and were married approximately 12 years. There were three children born of said marriage, Patrick, Jr., presently age 13, Paul, presently age 8, and Mark, presently age 7, who now reside with Plaintiff-Respondent. Since the Decree of Divorce, each party has established a separate life, both entering into a long-term relationship with a member of the opposite sex, Defendant-Appellant having been remarried.

Defendant-Appellant, until the present year had con-

tinued in the restaurant business. Plaintiff-Respondent was unemployed for a substantial period of time, but has now taken part-time employment. There exists as between the parties considerable animosity and it is reasonable to believe that but for the shared relationship of the parties with their children and the financial responsibility of Defendant-Appellant that each would have severed totally their relationship.

This matter has been adjudicated at length, and the court below has attempted to resolve by legal means a conflict that is essentially personal except as to the legal issues of support and visitation.

Plaintiff-Respondent and Defendant-Appellant are both in their mid-thirties and are of normal mental and physical health.

DISPOSITION IN LOWER COURT

The order of the court entered the 3rd day of June, 1976, includes the following provisions:

(1) Judgment for Plaintiff-Respondent in the sum of $785.00 for accrued alimony for the months of March and April, 1976.

(2) An order that future payments be made through the Family Support Division of the court on the 1st and 16th of each month in the sum of $330.00 for each half month.

(3) Setting a time certain for visitation on alternate weekends as certain conditions for their return on Sunday.

(4) Modification of the Decree allowing two weeks visitation during the summer to be taken in one continuous period or for two separate periods of one week each.

(5) That each party should bear their own attorneys' fees and costs.

This appeal is solely concerned with the order for alimony of $285.00 per month and takes no exceptions to the order of the court by the Honorable Bryant H. Croft on the 13th day of May, 1976.

ARGUMENT

For purposes of this appeal only the matter of alimony is brought before the Court for review. Appellant here concedes that the sum of $125.00 per month per minor child is not so excessive as to constitute an abuse of discretion for the continuance of said sum in the order of the trial court. That on the same economic background, the issues of child support and alimony are severable, is a matter of recent law (Dehm v. Dehm, 545 P.2d 525 at 526 [1976]).

SUMMARY OF TESTIMONY SUPPORTING APPELLANT'S CONTENTIONS

It is the contention of Appellant that his income has and continues to vary widely from year to year. Further, it is

contended by Appellant that his net economic position, apart from cash flow, has been in decline since the Amended Decree of Divorce. Appellant believes this contention is supported by testimony and the United States and Utah individual income tax returns for the years 1973, 1974 and 1975. For example, his adjusted gross income was $20,602.50 (R-106, l. 15), his total Federal tax on income was $4,897.44 (R-106, l. 22), his Utah State tax was $658.84 (R-110, l. 17) in 1973, leaving Appellant a net income for that year of $15,705.06.

In 1974 Appellant had an adjusted gross income of $27,046.00 (R-97, l. 15). His total tax liability to the Federal Government was $4,403.00 (R-97, l. 22), his Utah tax liability was $656.00 (R-105, l. 19), for an after-tax income of $21,987.00.

Whereas in 1975 Appellant had an adjusted gross income of $18,987.00 (R-87, l. 15) with a Federal tax liability of $818.00 (R-87, l. 20) and a Utah income tax of $169.00 (R-96, l. 19), for a net income of $18,000.00, a variation of several thousand dollars occurred from year to year. One figure remained constant, however, that was his support obligation accruing at the rate of $660.00 per month, an annual liability of $7,920.00.

In the above-mentioned years Appellant, with greater or lesser difficulty, could bear the order and support obliga-

tion. In 1976, however, certain events occurred that substantially reduced the monthly adjusted income of Appellant. June's Cafe began losing money and was sold (R-124, ll. 12-30). A certain management contract referred to as the Freeway Insurance Bank Contract terminated. Said contract had brough Appellant a gross income of $500-$600 per month (R-124, ll. 2-11). Appellant's monthly salary dropped to approximately $775.00 (R-125, ll. 1-9). The sale of June's Cafe with a payment of $25,000 was reduced by dispersals and obligations to the sum of $5,855.00. Appellant was awarded, as his sole and separate property, in the Amended Decree of Divorce, the equity in his then existing businesses. A predominant proportion of the proceeds of the sale of June's Cafe should be characterized as return of capital and is so recognized by both the United States Government and the State of Utah in their tax laws.

A PORTION OF THE INCOME DERIVED FROM THE OPERATION OF JUNE'S CAFE SHOULD BE ATTRIBUTED TO THE WORK OF APPELLANT'S WIFE.

The form W-2 of June's Cafe for the taxable year 1975 indicates an income from wages, tips and other compensation of $1,500.00 (R-87, attachment). Appellant testified, and it was uncontroverted that his present wife was employed on the average of 30 hours per week in the operation of June's Cafe. This annual rate of salary is a gross monthly income of $125.00. It

can be reasonably interpreted from the testimony that Appellant's present wife contributed a substantial part to the gross income of the business by working for such a nominal wage. This is supported by testimony of Appellant (R-128, ll. 10-30); (R-129, ll. 1-2). This testimony is in contrast with the uncontradicted testimony of Appellant that Respondent, during the course of their marriage, never worked (R-30, ll. 13-16). Respondent testified that even after the divorce she worked only sporadically or part-time employment despite what she characterized as substantial needs above and beyond the sum paid to her by Appellant (R-147, l. ll.).

It was the position of the trial court that a third party had not duty of support of minors with whom he might have social relationships (R-151, ll. 12-15). It can be just as reasonably held that Appellant's second wife has no duty of support of her husband's minor children. If the income generated by June's Cafe is properly attributed, in part, to the efforts of Appellant's wife, the Court, sitting in equity, should allow for this factor.

DECLINE IN EQUITY OF ASSETS AWARDED APPELLANT OVER TIME.

The assets now held by Appellant are in substantial part traceable to those assets awarded Appellant in the amended Decree of Divorce. For example, the proceeds of the Cross Roads

Restaurant, a sum of approximately $40,000, was eventually transmuted into the real estate contract now being paid Appellant for the sale of June's Cafe (R-144, ll. 9-17). The proceeds of the Hub Five also ultimately were absorbed into the net equity of Appellant in June's Cafe (R-144, l. 27-R-145, l.3).

Appellant has moved into a home with a purchase price less than one-half of that of his previous home (R-136, ll. 24-30; R-137, ll. 16-21). Appellant further testified that he made no profit from the sale of his former home and faced a possible loss pending litigation (R-143, ll. 10-21).

Appellant testified that his present motor vehicle had an out-of-pocket cost of $2,600.00, the remainder of the value having been provided by the equity in a truck previously awarded in the divorce decree as his sole and separate property (R-140, ll. 19-24), said vehicle having been used in his trade or business.

RELATIVE ECONOMIC CIRCUMSTANCE OF RESPONDENT.

Respondent testified that she was not employed at the time of the divorce (R-147, ll. 1-14), and had not been employed except for a brief period at Christmas time in 1974 until taking her present position in June, 1975 (R-147, l. 25-R-148, l. 20). She further testified that he expenses had not substantially changed between the time of the divorce and the present (R-148, l. 21-R-149, l. 16), and that her wage had been recent-

ly increased (R-151, l. 20-R-152, l. 4).

Respondent testified that she had no physical or mental problems that would prevent her from working full time (R-149, ll. 25-30). Respondent testified that the hour that she returned home after working part-time was 6:00, 6:30 or 7:00 p.m., a time later than most full-time daytime positions would require. She further testified that all her children were in school (R-150, ll. 18-19). It may therefore be argued that the undertaking of a full-time job would take no more time away from Respondent's children than now happens, but rather an earlier time for returning home might well occur. Respondent testified that the children are now alone until she returns from work (R-152, l. 22-R-153, l. 7).

On redirect, Respondent testified that she had made no effort to improve her skills or obtain additional education or in other ways become more productive (R-153, ll. 21-30).

I

THE TRIAL COURT HAS A DUTY TO EXAMINE THE TOTALITY OF THE CIRCUMSTANCES OF BOTH PARTIES AND DETERMINE THE AMOUNT OF ALIMONY THAT WOULD BE EQUITABLE TO BOTH PARTIES.

Speaking on the issue of modification of a decree of alimony, "...the courts upon the application of either party have the power to change, modify, or revise such a decree, and

whenever it is satisfactorily made to appear that the circumstances and conditions of the parties, or one of them, have changed so that the amount originally allowed is no longer just or equitable, the court may modify the same" (Buzzo v. Buzzo, 45 Utah 625, 148 P. 362 at 363 [1915]). The changes that occur subsequent to a decree of divorce are those of the general human condition. Former husbands and former wives do economically better or worse, and it has been theposition of the courts over time that these changes should be recognized.

"Again, suppose that a husband at the time a divorce is granted has ample means, and the court makes a liberal allowance to the wife as alimony.... Further, that in such case the husband, after the decree is entered, and after the time for appeal has elapsed suffers financial reverses and loses the most, if not all, of his property or he is injured physically, or loses his health, and the allowance is no longer just and equitable; why should not the court, upon such a statement of facts being shown, modify the decree by decreasing or setting aside the allowance theretofore made" (Cody v. Cody, 47 Utah 456, 154 P. 952 at 955 [1916]). The standard for modification remains as it has been historically that which is "reasonable and prudent" (Flannery v. Flannery, 536 P. 2d 136 at 138 [1975]).

This Court has viewed the overall impact of court-ordered division of property and support upon both the husband

and wife for some time:

> The object to be desired is to minimize animosities and to "let the dead past bury its dead" insofar as that is possible. The Court's responsibility is to endeavor to provide a just and equitable adjustment of their economic resources so that the parties can reconstruct their lives on a happy and useful basis. In doing so it is necessary for the Court to consider, in addition to the relative guilt or innocence of the parties, an appraisal of all the attendant facts and circumstances: the duration of the marriage; the age of the parties; their social positions and standards of living; their health; considerations relative to children, the money and property they possess and how it was acquired; their capabilities and training and their present and potential incomes (Wilson v. Wilson, 5 Utah 2d 79, 296 P.2d 977 at 979 [1956]).

II

THAT AT THE TIME OF THE DIVORCE DECREE TWO OF THREE CHILDREN HAD NOT YET STARTED SCHOOL, AND IT WAS ENVISIONED BY THE PARTIES IN THEIR STIPULATED AGREEMENT THAT PLAINTIFF-RESPONDENT WOULD NEED SUFFICIENT FUNDS TO BE ABLE TO BE HOME WITH THE CHILDREN. SUCH CIRCUMSTANCES HAVE CHANGED.

At the time of the divorce Plaintiff-Respondent, except for a brief interval of temporary work, had not been employed during the course of their marriage. After the decree, Plaintiff-Respondent did not work before all the children began attending school. At the present, Plaintiff-Respondent works part-time in a position that requires later hours than the

usual full-time employment.

In prior decisions this Court has placed emphasis on the contemplation of the parties and the trial court of the wife having or beginning employment at the time of the divorce decree in upholding the lower court's refusal to later modify the decree to reduce alimony (Short v. Short, 25 Utah 2d 326, 481 P.2d 54 at 55 [1971] ; Allen v. Allen, 25 Utah 2d 87, 475 P.2d 1021 at 1022 [1970]). Such is not the case here. At the time of the divorce decree Plaintiff-Respondent had virtually no work history and had two pre-school age children in her custody. It was then contemplated that she would not work. Years progressed, and Plaintiff-Respondent has taken employment. Each of her sons attends school during the day, and she, despite inflation, finds her overall dollar need no higher at the time of the motion for modification than at the time of the divorce. Felt v. Felt, 27 Utah 2d 103, 493 P.2d 620 at 623 (1972).

That Plaintiff-Respondent is able to maintain the payments on a then new automobile is indicative of a lack of hardship and change of circumstance that should have been considered by the court below. Mitchell v. Mitchell, 527 P.2d 1359 at 1360 (1974).

III

THE STANDARD OF REVIEW BEING THAT THE TRIAL COURT HAS CONSIDERABLE DISCRETION DOES NOT EXTEND TO THE DEGREE THAT IF A MANIFEST INJUSTICE OR INEQUITY APPEARS FROM THE RECORD THAT THE LOWER COURT MAY NOT BE REVERSED FOR AN ABUSE OF DISCRETION.

"In any event, solutions of these domestic problems are difficult and largely not capable of a satisfactory solution either to the judge, or the parties. The court is often compelled to use every ingenuity in order to stimulate human nature to do its duty or its utmost toward fulfillment of that duty. This Court does not have those problems to meet. But in a number of cases, we have taken upon ourselves to modify decrees in ways which were insubstantial as compared to what is asked in this case" (Pinion v. Pinion, 92 Utah 255, 67 P.2d 265 at 268 [1937]). There the court reversed on the facts and remanded the case to the lower court.

The importance of the trial transcript, as it might indicate the accuracy of factual determinating is indicated in a recent decision of this Court, Mitchell v. Mitchell, supra. In the instant case it is the uncontradicted testimony of Defendant-Appellant that a substantial change in his economic life had occurred in 1976 and that the conditions that existed in 1973, 1974 and 1975 no longer existed. It would be improper for the trial judge to speculate as to the future earnings of Appel-

lant when th only testimony on the record as to Defendant-Appellant's present earning capacity showed a substantial decline in salary and net worth.

Although limited by some more recent cases, and the need for judicial finality in domestic relations cases, the holding in Hendricks v. Hendricks, 91 Utah 553, 63 P.2d 277 at 279 (1936), that this Court has the power to modify alimony on a sufficient showing of facts is today undisturbed: "...that if upon examination of the record, this Court is convinced that the award in the trial court is inequitable and unjust, it should direct such decree as it finds to be just and equitable."

In a more recent case this Court held: "We remain aware of the prerogatives and broad discretion accorded the trial court in matters of divorce and supplemental proceedings therein. Nevertheless, this certainly does not extend to an arbitrary and unreasoning power to disregard this proceeding being in equity, this Court may review questions of both law and fact the very purpose of which is to rectify errors where the evidence does not support the findings or where it clearly preponderates against them" (King v. King, 478 P.2d 492 at 495, 496 [1970]).

Again in family matters: "This is an equitable matter, and upon appeal the binding effect of the findings made by the trial court differs from that in a law matter. We may here review questions of both law and fact; and after making due al-

lowance for the advantaged position of the trial judge to observe the demeanor of witnesses upon the stand, we may be persuaded that a finding is against the preponderance of evidence to such an extent that we would be justified in disapproving it or even making a finding of our own" (Wiese v. Wiese, 24 Utah 2d 236, 469 P.2d 504 at 505 [1970]).

CONCLUSION

Appellant respectfully submits that the lower court erred in ordering continuation of the alimony provisions of the Amended Decree of Divorce unchanged and that that order should be reversed upon its merits.

Respectfully submitted,

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